

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CITIZENS' ALLIANCE FOR PROPERTY  
RIGHTS,

Plaintiff,

v.

THE CITY OF DUVALL,

Defendant.

CASE NO. C12-1093RAJ

ORDER

**I. INTRODUCTION**

This matter comes before the court on Plaintiff's motion for reconsideration of the court's September 16, 2013 order granting summary judgment in favor of Defendant. For the reasons stated below, the court concludes that its prior order was based in part on an error of law, and the court thus VACATES that order. The court concludes, however, that Defendant is nonetheless entitled to summary judgment on grounds that the court did not reach in its prior order. The court therefore GRANTS the motion for reconsideration (Dkt. # 32) solely to the extent that it requests that the court correct an error of law. The court directs the clerk to VACATE its September 16, 2013 judgment and to enter a new judgment for Defendant in accordance with this order.

**II. SUMMARY**

Plaintiff, the Citizen's Alliance for Property Rights (the "Alliance"), contends that the City of Duvall is violating the Clean Water Act (33 U.S.C. Ch. 26, "CWA") by discharging pollutants onto property that two of its members, Steve and Rhonda Mills,

1 own. There is no dispute that the City discharges stormwater onto the Mills Property, the  
2 only dispute is whether that discharge violates the CWA.

3 The court granted the City's motion for summary judgment for two reasons. First,  
4 it concluded that the Alliance had offered no evidence that the City was discharging  
5 stormwater into the navigable waters of the United States. Second, it concluded that the  
6 Alliance could not state a CWA claim merely by alleging that the City did not comply  
7 with its National Pollutant Discharge Elimination Permit ("NPDES Permit").

8 The Alliance moved for reconsideration on three grounds. It contended that it had  
9 presented evidence of a discharge of stormwater into the navigable waters of the United  
10 States. It contended that the CWA permits citizen suits for violations of an NPDES  
11 Permit. Finally, it claimed that the court made its ruling because of "assumptions and/or  
12 inferences about [the Alliance]'s motives that were made in favor of [the City] . . . in  
13 violation of the standard on summary judgment." Pltf.'s Mot. (Dkt. # 32) at 1.

14 A party moving for reconsideration must meet a high standard:

15 Motions for reconsideration are disfavored. The court will ordinarily deny  
16 such motions in the absence of a showing of manifest error in the prior  
17 ruling or a showing of new facts or legal authority which could not have  
been brought to its attention earlier with reasonable diligence.

18 Local Rules W.D. Wash. LCR 7(h)(1).

19 For the reasons stated herein, the court concludes that the Alliance satisfied this  
20 standard only to the extent that it argues, correctly, that the CWA permits citizen suits for  
21 violations of an NPDES permit without proof of a nexus between the violation and the  
22 navigable waters of the United States. The court erred when it held otherwise. The City  
23 is nonetheless entitled to summary judgment, however, because the Alliance did not offer  
24 evidence from which a finder of fact could conclude that the City has violated its NPDES  
25 permit.

### III. ANALYSIS

#### A. The NPDES Permit System and CWA Citizen Suits

There is more than one way to violate the CWA, and more than one way for a citizen (or group of citizens) to sue for those violations. The citizen suit provision of the CWA authorizes suits against local governments who are “alleged to be in violation of . . . an effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a)(1). The Act is explicit as to seven categories of “effluent standard or limitation under this chapter” whose violation will satisfy the citizen suit provision. 33 U.S.C. § 1365(f)(1)-(7). Two are relevant to this case: “an unlawful act under subsection (a) of section 1311” and “a permit or condition thereof issued under section 1342 . . . .” 33 U.S.C. § 1365(f)(1) & (f)(7). Subsection 1311(a) makes it unlawful to discharge any pollutant except in compliance with various provisions of the CWA, and it is this provision that the City focused on in its summary judgment motion. 33 U.S.C. § 1311(a) (“Except as in compliance with this section and [other] sections . . . of this title, the discharge of any pollutant by any person shall be unlawful.”). Both subsection 1311(a) and subsection 1365(f)(7) mention section 1342 of the CWA, which is the portion of the Act authorizing NPDES permits.

An NPDES permit is thus an integral aspect of at least two types of CWA citizen suit. The first, invoking subsection 1365(f)(1), is for the discharge of a pollutant without an NPDES permit, a cause of action that requires a plaintiff to prove that a defendant, without an NPDES permit, “(1) discharged, i.e., added (2) a pollutant (3) to navigable waters (4) from (5) a point source.” *Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 307-08 (9th Cir. 1993). This was the only type of citizen suit that the City mentioned in its summary judgment motion.

The second type of CWA citizen suit is one, invoking subsection 1365(f)(7), for violation of an NPDES permit. The City did not mention that type of suit in its motion for summary judgment and the Alliance offered no authority for that type of suit in its

1 response to that motion. Even on reconsideration, the Alliance cites no authority for a  
 2 suit based purely on a violation of an NPDES permit. Regardless of the Alliance's  
 3 citation of authority, there is binding authority recognizing that citizens can bring CWA  
 4 suits to enforce an NPDES permit or a condition thereof. *NW Environmental Advocates*  
 5 (*"NWEA"*) v. *City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995). Although some courts  
 6 disagree, the Ninth Circuit has held that citizens may enforce "permit conditions based on  
 7 both EPA-promulgated effluent limitations and state-established standards," including  
 8 "requirements for retaining records of discharge sampling and for filing reports." *NWEA*,  
 9 56 F.3d at 988; *but see Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353,  
 10 358-59 (2d Cir. 1993) ("[S]tate regulations, including the provisions of SPDES permits,  
 11 which mandate a greater scope of coverage than that required by the federal CWA and its  
 12 implementing regulations are not enforceable through a citizen suit under 33 U.S.C.  
 13 § 1365.") (internal quotation omitted).

14 **B. The Alliance Did Not Cite Evidence Critical to Its Claim That the City's**  
 15 **Discharge on the Mills Property Violates Subsection 1311(a).**

16 As to a citizen suit based on subsection 1311(a) of the CWA, the court granted  
 17 summary judgment to the City because the Alliance offered no evidence of a discharge  
 18 into the navigable waters of the United States.

19 What the Alliance does not do . . . is demonstrate that discharges onto the  
 20 Mills property wash downstream into any body of water. The Alliance has  
 21 not so much as *named* a body of water, much less provided evidence that  
 22 the Mills property is connected to a body of water in a way that would  
 23 bring the City's alleged discharges within the scope of the Act.

24 Sept. 16, 2013 ord. (Dkt. # 28) at 4 (emphasis in original).

25 For the first time in its motion for reconsideration, the Alliance cited evidence that  
 26 the City's discharges on the Mills property have an impact on the waters of the United  
 27 States. For the first time, it cited a single sentence of its hydrology expert's report: "The  
 28 storm water that is discharged onto the subject property is not 100% infiltrated and  
 reenters the City's MS4 system which has an outfall on the Snoqualmie River." Pltf.'s

1 Mot. at 5 (quoting Neugebauer Decl. (Dkt. # 18), Ex. B at p.27). In other words, there is  
2 evidence that the City does not merely discharge water on the Mills property, but that at  
3 least some of that water reenters the City's stormwater system, which eventually  
4 discharges into the waters of the United States.

5 The Alliance could have cited that evidence in its response to the City's motion for  
6 summary judgment, but it did not. To obtain reconsideration of an order based on  
7 evidence, a party must show that the evidence "could not have been brought [to the  
8 court's] attention earlier with reasonable diligence." LCR 7(h)(1). The Alliance cannot  
9 meet that standard, because it plainly could have cited the pertinent portion of its own  
10 expert's report well before it moved for reconsideration.

11 To the extent that the Alliance believes the court erred by not finding the evidence  
12 on its own, it is mistaken. *See, e.g., Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1058  
13 (9th Cir. 2009) ("The party opposing summary judgment must direct the court's attention  
14 to specific, triable facts, and the reviewing court is not required to comb through the  
15 record to find some reason to deny a motion for summary judgment.") (internal citations,  
16 quotations, and alterations omitted). This court's local rules require all parties, "insofar  
17 as possible," to "cite the page and line of any part of the transcript or record to which  
18 their pleadings, motions, or other filings refer." LCR 7(e)(6). The Alliance's decision  
19 not to cite evidence critical to its opposition is its own error. *Dzung Chu v. Oracle Corp.*,  
20 627 F.3d 376, 386 (9th Cir. 2010).

21 The Alliance also argued on reconsideration that the mere existence of an NPDES  
22 permit is somehow proof that the discharges on the Mills property are within the scope of  
23 the CWA. The Alliance is mistaken. An NPDES permit is necessary for discharges with  
24 a nexus to the waters of the United States; no permit (or at least no ND PES permit) is  
25 necessary to discharge pollutants into places lacking such a nexus. By failing to offer  
26 evidence of a discharge of pollutants into a place with a nexus to the waters of the United  
27

1 States, the Alliance failed to meet its burden to show an unpermitted discharge within the  
2 scope of the CWA.

3 **C. The Alliance Did Not Present Evidence From Which a Finder of Fact Could**  
4 **Conclude that the City Is In Violation of Its NPDES Permit.**

5 The court also granted summary judgment as to the Alliance's claim that the City  
6 is in violation of its NPDES permit. The court noted the dearth of evidence to support  
7 that claim. Sept. 16, 2013 ord. at 6 ("[The Alliance] cites no portion of the [City's  
8 NPDES] permit, a document more than 60 pages long, to support its contention."). But  
9 rather than decide if the "Alliance's minimal effort to demonstrate an NPDES permit  
10 violation suffices to sustain its burden on summary judgment," the court ruled that the  
11 lack of evidence of a nexus between any permit violation and the waters of the United  
12 States was fatal to the Alliance's claim. *Id.* That was error. The Ninth Circuit has never  
13 explicitly imposed a requirement of a nexus between an NPDES permit violation and the  
14 waters of the United States. It has, moreover, favorably cited cases holding the opposite.  
15 *NWEA*, 56 F.3d at 988-89 ("[C]itizen groups may enforce even valid permit conditions  
16 that regulate discharges outside the scope of the Clean Water Act, namely discharges that  
17 may never reach navigable waters.") (citing *Conn. Fund for Env't v. Raymark Indus.*, 631  
18 F. Supp. 1283, 1285 (D. Conn. 1986)). The parties cited no case law addressing citizen  
19 suits for permit noncompliance, but unlike a party's failure to cite evidence, the court  
20 cannot excuse its own legal error merely because a party failed to cite applicable law.

21 That the court made an error of law, however, does not necessarily mean that it  
22 erred when it granted summary judgment. The court expressly declined in September to  
23 decide whether the Alliance had provided evidence from which a finder of fact could  
24 conclude that the City was in violation of its NPDES permit. It now concludes that the  
25 Alliance did not meet its burden.

26 The City devoted a substantial portion of its summary judgment motion to  
27 evidence and arguments that any stormwater discharge on the Mills property was in

1 compliance with its NPDES permit. In response, the Alliance argued that the City “must  
2 establish that its dumping of point source water from its M[unicipal Separate Storm  
3 Sewer Systems] onto the Mills Property is somehow in compliance with its NPDES  
4 permit to avoid liability.” Pltf.’s Opp’n (Dkt. # 17) at 8. The Alliance was mistaken. As  
5 the plaintiff, it would bear the burden of proof of permit noncompliance at trial. The City  
6 established, through both evidence and argument, either that it complied with its permit  
7 or that there was no evidence to the contrary. *See Celotex Corp. v. Catrett*, 477 U.S. 317,  
8 323 (1986) (noting that a party moving for summary judgment against the party who  
9 bears the burden of proof at trial need only point out “that there is an absence of evidence  
10 to support the nonmoving party’s case”); *Fairbank v. Wunderman Cato Johnson*, 212  
11 F.3d 528, 532 (9th Cir. 2000) (noting that moving party can meet its burden by “pointing  
12 out through argument” the absence of evidence supporting a plaintiff’s claim). That  
13 sufficed to obligate the Alliance to cite specific evidence to support its claim that the City  
14 is in violation of its NPDES permit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
15 (1986); *Devereux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001); *Fairbank*, 212 F.3d at  
16 532.

17 The Alliance did not cite evidence of permit noncompliance. It cited just two  
18 clauses of the permit, one that establishes only that the City remains liable to the extent  
19 that it delegates responsibility for permit compliance to another entity, and one that  
20 permits it to have secondary permittees. The Alliance cited those clauses in suggesting  
21 that the City’s discharges on the Mills property effectively make the Mills property part  
22 of its stormwater management plan. Even if the court accepts that assertion, the Alliance  
23 has cited no evidence that the City’s use of the Mills property in this manner is a  
24 violation of its NPDES permit.

25 Because the Alliance did not cite evidence from which a finder of fact could  
26 conclude that the City violated its NPDES permit, the court grants summary judgment  
27 despite the legal error in its September 2013 order.

1 Before concluding, the court considers the Alliance's assertion that the September  
2 16 order was the result of the court's statements regarding the Alliance's motives in filing  
3 this suit. The Alliance's motives had no bearing on the September 16 order, its failure to  
4 cite evidence did. The court discussed the Alliance's goal of ultimately permitting the  
5 Mills to do as they wish with their property, but it did so in considering whether the  
6 Alliance had a strategic reason for failing to offer evidence of a nexus between the City's  
7 discharges on the Mills property and the waters of the United States. That consideration  
8 ultimately had no impact on the court's ruling.

#### 9 IV. CONCLUSION

10 For the reasons stated above, the court VACATES its September 16, 2013 order  
11 granting summary judgment (Dkt. # 28) and the judgment (Dkt. # 29) that accompanied  
12 that order. The court GRANTS the Alliance's motion for reconsideration (Dkt. # 32)  
13 solely to the extent that it requests that the court correct an error of law. The court  
14 concludes that the City is entitled to summary judgment despite that legal error. The  
15 court therefore directs the clerk to enter a new judgment for the City.

16 Dated this 8th day of April, 2014.

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20 The Honorable Richard A. Jones  
21 United States District Court Judge  
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